Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of	)	
	)	
Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments	)	**MB Docket No. 07-51**
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	)	

REPLY COMMENTS OF THE FIBER-TO-THE-HOME COUNCIL IN THE FURTHER NOTICE OF PROPOSED RULEMAKING

The Fiber-to-the-Home Council ("FTTH Council" or "Council"), by its attorneys, hereby submits the following reply comments to the Federal Communications Commission ("Commission") in response to the Further Notice of Proposed Rulemaking ("*Multiple Dwelling Unit ('MDU') FNPRM*") issued in the above-captioned proceeding.[1]

The FTTH Council is a non-profit organization established in 2001. Its mission is to educate the public and government officials about fiber-to-the-home ("FTTH") and to promote and accelerate FTTH deployment and the resulting quality of life enhancements FTTH networks make possible. The FTTH Council's members represent all areas of the broadband access industry, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities,

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[1] *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Further Notice of Proposed Rulemaking, MB Docket No. 07-51, Rel. November 13, 2007.

and municipalities.[2] Of particular relevance to the *MDU FNPRM*, some members of the FTTH Council construct FTTH networks in private real estate developments or other MDU environments ("private broadband networks" or "PBNs"). These networks are then used by either affiliated or unaffiliated non-cable multichannel video programming distributors ("private MVPDs," including PCOs). In many instances, these PBN deployers or private MVPDs have entered into agreements with homeowners' or condominium associations containing either exclusivity clauses or bulk-billing arrangements to provide FTTH networks or video services over FTTH networks in real estate developments or communities.[3] The objective of the FTTH Council in these reply comments is to focus on a single but critical issue: the important and extensive role played by state law in addressing any potential concerns the Commission might have about exclusive or bulk billing arrangements binding a homeowners' or condominium association, particularly before the association is controlled by its members. The existence of these state laws provide further justification for the Commission refraining from adopting any new regulations.

I. State Laws Address Potential Concerns Regarding Private MVPDs Raised by the Commission in the *MDU FNPRM*

In the *MDU FNPRM*, the Commission inquires as to whether it should impose new restrictions and regulations on the ability of private MVPDs to enter into exclusivity or bulk billing arrangements in private real estate developments or other MDU environments. As indicated in the initial comments of the FTTH Council, for a variety of reasons, the Commission

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2 As of today, the FTTH Council has more than 150 entities as members. A complete list of FTTH Council members can be found on the organization's website, http://www.ftthcouncil.org.

3 These FTTH network builders and the private MVPDs are not subject to section 628 for varying reasons, including that these networks are constructed solely in private rights-of-way. *See,* the exemption in the definition of "cable system"(47 U.S.C. §522 (7)(B)).

should not do so. A key reason for not pursuing such a course is that there are already in place state laws that govern the rights of residents of homeowners' and condominium associations and other MDUs to obtain services of their choice from private MVPD providers of their choice.

The regulation of the relationships among homeowner associations, developers, PBN deployers, and private MVPDs is already subject to various state laws and regulations. There are already at least 23 states that have in place comprehensive regulatory schemes that govern the right of homeowner associations to manage the networks that may serve their developments, and that permit the homeowners associations to reject agreements that were put in place by developers prior to control of the association by the homeowners.[4] Each of these state regulatory schemes already provide protection to the association for service contracts entered into with developers before turnover of control of the association to the unit owners ("pre-association contracts"). There are several different versions of these types of regulations, and the Commission should abstain from adopting new regulations that will conflict with unknown state laws, an unknown number of association bylaws, and an unknown number of existing pre-association contracts.

For example, numerous states have adopted versions of the Uniform Condominium Act § 3-105 to address the cancellation or termination of pre-association contracts. Section 3-105 provides that:

> If entered into before the executive board elected by the unit owners pursuant to Section 3-103(f) takes offices, (i) any management contract, employment contract, or lease of recreational or parking areas or facilities, (ii) any other contract or lease between the association and a declarant or an affiliate of a declarant, or (iii) any contract or lease that is not bona fide or was unconscionable to the unit owners at the time entered into under the circumstances then prevailing, may be terminated

[4] 1 Law of Condominium Operations § 8:45. (These states are: Alaska, Arizona, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Louisiana, Maine, Nebraska, New Jersey, Michigan, Minnesota, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, and Wisconsin)

> without penalty by the association at any time after the executive board elected by the unit owners pursuant to Section 3-103(f) takes office upon not less than (90) days' notice to the other party.

Virtually identical language has been adopted in Colorado (C.R.S.A. § 38-33.3-305), Connecticut (C.G.S.A. § 47-247), Maine (33 M.R.S.A. § 1603-105), Pennsylvania (68 Pa.C.S.A. § 3305), Texas (V.T.C.A., Property Code § 82.105), and Wisconsin (W.S.A. 703.35), among other states. New Jersey has adopted a variation of the 90 day notice requirement by mandating any applicable contract to be automatically terminated within 90 days of the condominium association's first meeting unless the association otherwise ratifies the contract. N.J.S.A. 46:8B-12.2. Arizona completely eliminates the concept of notice but otherwise adopts the language of the Uniform Condominium Act. A.R.S. § 33-1245. In Arizona, pre-association contracts are required to contain a provision permitting the condominium association to terminate the contract "without penalty." *Id.*

State laws not only govern the relationship among the homeowners' association, the developer, the PBN deployer, and the private MVPD, but they also have significant affect on the terms and conditions of commercial contracts among these entities. While some states have followed the Uniform Condominium Act, other states provide regulatory schemes that vary the parameters laid out in §3-105 of the Uniform Condominium Act or provide for unique regulatory structures, and these provisions are incorporated into commercial agreements. For example, Georgia statutes provide that "any management contract, any lease of recreational area or facilities, or any other contract or lease executed by or on behalf of the association during the period of the declarant's right to control the association pursuant to subsection (a) shall be subject to cancellation and termination at any time during the 12 months following the expiration of such control period by the affirmative vote of the unit owners of units to which a majority of

the votes in the association pertain, unless the unit owners by a like majority shall have theretofore, following the expiration of such control period, expressly ratified and approved the same." GA Code Ann § 44-3-101.[5] Louisiana has a similar regulatory scheme. LSA-R.S. 9:1123.105. Contracts entered into prior to a condominium association's first meeting are limited to a maximum of three years in Oregon. O.R.S. § 94.221. And, in Michigan, a developer contract is voidable by the board within 90 days of the transfer of control to the condominium owners. M.C.L.A. 559.155.

These state regulatory schemes have permitted individuals and business to order their affairs according to their well-established requirements. One such example is Florida where regulations provide that, "if unit owners other than the developer own not less than 75 percent of the voting interests in the condominium, the cancellation [of pre-association contracts] shall be

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[5] In regard to the comments filed on December 18, 2007 by The Plaza Midtown Homeowners Association ("Plaza Midtown") regarding a dispute in the state of Georgia, the Council note that Plaza Midtown's complaints reflected in its comments are a matter of state law that permits associations to terminate service agreements signed by developers prior to turnover of the association to the unit owners, so that the association may bring in third party providers of their own choosing. It appears that Plaza Midtown simply failed to invoke its rights under Georgia law (Georgia Statute O.C.G.A. § 44-3-101(c)) within the one year deadline established by the statute to terminate the service agreements entered into by the association prior to turnover of the association to the owners. State laws in various states adequately protect homeowners and condominium associations' rights with respect to third party service provider contracts entered into prior to such a turnover event, and the Commission should not base its rule making in this proceeding on a matter that clearly falls under the exclusive purview of the states nor should the Commission feel compelled to intervene on behalf of Plaza Midtown in such a matter. Plaza Midtown has been afforded adequate remedies under Georgia state law and in its comments indicates it is currently pursuing those in state court (further indicating that Commission intervention is unnecessary).

Finally, as further indication that Plaza Midtown's filing is effectively a mere complaint under state law, and an effort to cure its failure to properly invoke its rights under state law, Plaza Midtown does not seek to have the Commission prohibit all bulk services agreements but only those bulk services agreements entered prior to turnover of the association to the unit owners. It states the Commission should "permit exclusive contracts entered into by an association controlled by its homeowners/members."

concurrence of the owners of not less than 75 percent of the voting interest other that the voting interests owned by the developer," F.SA. § 718.302(1)(a). Florida statute goes on to mandate that pre-association contracts "be fair and reasonable," and Florida further provides a litigation structure for enforcement of its regulatory scheme, directing summary procedures be used and awarding reasonable attorney fees to the prevailing party. F.S.A. § 718.302(4); F.S.A. § 718.302(6). This regulatory structure is supported by the Florida courts, resulting in a developed jurisprudence based on the cancellation of pre-association contracts.

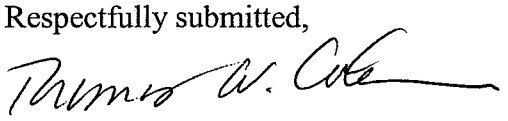
Similarly, other states have developed varying levels of jurisprudence based on their individual regulatory schemes. In Wisconsin, for example, the court interpreted a statute similar to Section 3-105 of the Uniform Condominium Act to find that, under the Wisconsin statute (W.S.A. 703.35), "to be terminable under the provision at issue, a [pre association] contract must *presently* bind the Association contractually to the person or entity that declared the condominium (or to some person or entity 'affiliated with' the declarant)," *Hunt Club Condominiums, Inc. v. Mac-Gray Services, Inc.*,295 WIS.2d 780, 790, 721 N.W.3d 117 (2006) (emphasis added).

II. Conclusion

From the forgoing discussion, it is plain that states have developed comprehensive regulatory structures to address pre-association contracts containing exclusivity clauses and bulk billing arrangements. These regulatory structures afford homeowners' and condominium associations opportunities to terminate or cancel the terms of a pre-association contract with which they disagree so long as the requirements of the state regulations are met. These state laws protect homeowners' and condominium associations from being bound by pre-association contracts with which they disagree, while permitting these associations to enter into bulk

arrangements of their choosing. It is for that reason – as well as the reasons put forward in its initial comments, that the FTTH Council believes there is no need for the Commission to address these areas as the states have provided ample protection of the rights of residents of MDUs to obtain the services of their choice from private MVPD providers of their choice.

Respectfully submitted,



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